

REMARKS

The examiner states that Kumar (6,434,637) anticipates the instant invention as claimed in claims 1, 2, 5-9, 23-36, 32, 35-39, 57, 58, 61-65, 78, 79, and 82—claims 1, 25, 32, 57 and 78 are independent claims. These rejections are carried over from the previous Office Action, and now made final. In the interest of avoiding the expense and delay of an unnecessary appeal, Applicant offers the following succinct arguments against the legal sufficiency of the examiner's rejections, and respectfully requests the examiner to take a fresh look at Kumar.

As a first step, Applicant notes that a finding of anticipation under 35 U.S.C. § 102 is proper only if the cited reference discloses each and every limitation of the claimed invention, is enabling, and describes the claimed invention sufficiently to have placed it into the possession of one of ordinary skill in the art. *In re Paulson*, 30 F.3d 1475, 31 USPQ2d 1671 (Fed. Cir. 1994). See, also, *In re Bond*, 910 F.2d 931, 15 USPQ2d 1566 (Fed. Cir. 1990) (*stating that a prior art reference anticipates the claim in question only if every element of the claimed invention is identically shown in the reference in the same arrangement as claimed*).

In terms of developing a factual record during examination supporting the finding of anticipation, the PTO generally must show a sound basis for believing that the claimed invention is the same as the prior art and, upon such a showing, the burden shifts to the applicant to show they are not the same. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). That is, the applicant rebuts the prima facie case of anticipation by submitting evidence showing that the prior art is not the same as the claimed invention.

With the above in mind, Applicant submits that (1) the examiner has not provided a sound basis for believing that Kumar is the same as the claimed invention, and (2) Applicant has submitted evidence showing that the prior is not the same as the claimed invention.

No Sound Basis for Finding Anticipation or Obviousness

In his anticipation rejection arguments against the independent claims of the instant application, the examiner cites to col. 5, lines 46-67 and col. 6, lines 27-31 of Kumar for the

proposition that Kumar teaches varying a first reverse link transmit power level responsive to commands from a serving base station, and varying a second reverse link transmit power level responsive to commands from at least one non-serving base station—see Final Office Action, p. 3. Respectfully, the plain language of Kumar directly contradicts the examiner and he will not be able to substantiate these assertions on appeal. (Note that the failings of the examiner's obviousness rejections cause all of the obviousness rejections to fail, as well.)

For example, the cited lines in col. 5 of Kumar simply recite reverse link power control according to the "cdma2000 standards," wherein a mobile station does not increase its reverse link transmit power unless all of its active set base stations transmit an up command—this is the classic "AND" of the ups, and "OR" of the downs power control detailed as background in the instant application. Applicant explicitly describes this conventional method of reverse link power control in the background of the instant application at p. 3, line 22 – p. 4, line 9. Rather than showing anticipation of Applicant's claims, col. 5 of Kumar actually reinforces Applicant's position that the instant claims patentably define over what Kumar acknowledges as the "standard" approach to reverse link power control, where the mobile station's transmit power as a whole is interdependently controlled by the serving and non-serving base stations.

The cited lines of col. 6 of Kumar are of no help to the examiner, either. Specifically, lines 27-31 of col. 6 simply state that Kumar's *"invention is directed to a technique for transmitting power control signals from a base station to a mobile, where the mobile uses those power control signals to control the transmit power level of its reverse-link channels."* This sweeping, generalized statement in no way touches on the actual details of the instant claims—indeed, it includes no details of any kind. (If this kind of statement supports anticipation then, according to the examiner's logic, any reference that mentions reverse link power control would stand as an anticipating reference.)

In short, the examiner finds that Applicant's claims are anticipated by combining Kumar's explanation of conventional cdma2000 power control, which the instant application already

details in its background section, with a hopelessly general comment in the specification of Kumar, stating that Kumar teaches reverse link power control. To understand how far short the examiner's anticipation arguments fall from being legally sufficient, Applicant requests that the examiner look at claim 1 in more detail.

Specifically, claim 1 includes the limitations of "*varying a first transmit power level of the mobile station on a first reverse link channel responsive to power control commands from a serving base station,*" and "*varying a second transmit power level of the mobile station on a second reverse link channel responsive to power control commands from at least one non-serving base station.*" Against these detailed limitations, the examiner's rejection arguments—in their entirety—rely on col. 5, lines 46-67, which explicitly states that cdma2000 standards do not provide the kind of separated serving/non-serving base station control claimed, and col. 6, lines 27-31, which literally says nothing other than generically identifying that Kumar teaches reverse link power control.

Conclusion

Respectfully, the undersigned attorney believes that it will be a waste of the examiner's time, Applicant's time, and Applicant's money to force this Final Rejection into the appeal process. On that basis, Applicant again asks the examiner to take another look at Kumar and, if he believes it would be helpful, to call the undersigned attorney for further discussion.

Respectfully submitted,

COATS & BENNETT, P.L.L.C.

By:



Michael D. Murphy
Registration No. 44,958

P.O. Box 5
Raleigh, NC 27602
Telephone: (919) 854-1844

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT THIS DOCUMENT IS BEING DEPOSITED WITH THE UNITED STATE POSTAL SERVICE, ON THE DATE INDICATED BELOW, AS FIRST CLASS MAIL, POSTAGE PREPAID, IN AN ENVELOPE ADDRESSED TO: **Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

Signature: _____

Name: Amy Martin

Date: 21 June 2005